

Civil and Labor Rights Policy Recommendations for the Department of Homeland Security (DHS)

Take the fear of immigration retaliation and intimidation off the table in workplace and civil rights disputes

The 2011 “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs Memorandum” (“the Victims’ Memo”) gives special consideration to individuals reporting crimes and pursuing actions to protect their civil rights. [11] Specifically, the guidance **presumes** eligibility for deferred action for “individuals engaging in a protected activity related to civil or other rights.” [12] In practice, however, the worker is assessed for relief only **after** an ICE enforcement action. **This defeats the intended purpose of the Victims’ Memo.**

Therefore, it is essential that DHS immediately:

- **Strengthen the Victims’ Memo and clarify the process by which immigrants defending labor and civil rights can apply for deferred action before United States Citizenship and Immigration Services (USCIS)**: When an immigrant defends his or her labor and civil rights, he or she should not have to wait to be placed into deportation proceeding before applying for deferred action. In keeping with existing DHS policy, USCIS should apply the standard set forth by ICE in the Victims’ memo—or a similar standard—to the adjudication of these workers’ deferred action requests.

In fact, for workers enforcing their rights on the job, the term “labor disputes” has already been defined by a Memorandum of Understanding (MOU) between the Department of Labor and the Department of Homeland Security. [13] The definition includes disputes regarding the right to be paid the minimum wage, a promised contracted wage, and overtime; to have a safe workplace and receive compensation for work-related injuries; to be free from unlawful discrimination; to form, join or assist a labor union and participate in collective bargaining and engage in protected concerted activities; and to be free from retaliation for seeking to enforce the above rights. This is vital to ensure that workers can fully enforce their labor and civil rights and would help make the promises of the Victims’ Memo meaningful.

- **Provide new more detailed guidance, training, and case review implementing the Victims’ Memo**: The Victims’ Memo clarified the standards for prosecutorial discretion for victims, witnesses and plaintiffs, including individuals engaging in a protected activity related to civil or other rights, in important ways. This includes a general presumption that favorable discretion for such individuals is appropriate and that only “serious adverse factors” should disturb it. Practices to date however indicate that further guidance, training, and case review is necessary to ensure effective and consistent implementation of this existing policy. While the default deferred action application process should be before USCIS, the process should allow for individuals who are in proceedings to make requests before ICE.

Ensure that Worksite Enforcement does not Undermine Immigrants' Labor and Civil Rights

Worksite enforcement can have serious repercussions for workers. Some employers manipulate the immigration system, using the possibility of conducting an audit as a threat against workers who are enforcing their labor rights. Alternatively, some employers involved in a labor dispute may contact ICE in order to initiate a worksite enforcement action. DHS should ensure workplace rights are not stifled by creating more transparency between ICE and the workforce, and reaffirm its commitment to non-interference during labor disputes.

- **DHS should revise its internal operating instructions regarding enforcement of immigration laws in the workplace to ensure that enforcement actions do not interfere with workers' rights and reaffirm that non-interference in labor disputes is the current agency policy.** In the late 1990s, internal guidelines under Immigration Nationality Service's (INS) Operating Instruction 287.3a (now designated as ICE Special Agents Field Manual 33.14(h)) were adopted to address the impact enforcement can have on workers' efforts to exercise and enforce their workplace rights. However, the operating instructions were created almost two decades ago during a time when worksite raids were the primary enforcement mechanism and were tailored to address these issues. In contrast, today's enforcement regime is heavily focused on immigration audits. DHS should issue a revised operating instruction that adequately protects workers in the context of today's enforcement regime.
- **Prior to the initiation of any immigration worksite enforcement action, including I-9 audits, ICE should create a process of determining whether workers have made formal or informal complaints regarding their labor or civil rights, or the terms and conditions of their employment within the last 12 months.** Currently, ICE is required to contact DOL and inquire whether there is an ongoing labor dispute prior to initiating a worksite enforcement action. ICE should also both affirmatively investigate and inquire with the National Relations Labor Board (NRLB) and state labor agencies before beginning a worksite enforcement action.
- **ICE should create a system where workers who stand to lose their jobs as a result of an audit can request documents and any information regarding their particular case (including information sent by their employer).** This change is necessary to ensure greater transparency and make it easier for workers to enforce their rights during I-9 audits.

- **DHS should clarify and work with DOL to better enforce employers' misuse of electronic verification.** Many employers have wrongfully used E-Verify, to deter employees from invoking their labor-organizing rights. DHS should revoke employers' use of electronic verification if the worker asserts their employment rights as a result of such retaliation.
- **DHS should ensure compliance with the "Enforcement Actions at or Focused on Sensitive Locations Memorandum"[14] and expand the list of sensitive locations for which enforcement actions require prior approval to include:**
 - State and federal courthouses and administrative agencies and locations where proceedings related to a pending court case or administrative complaint are taking place;
 - Workplaces during labor disputes, including but not limited to when there is a strike, lockout, picketing, leafleting or public demonstration.
 - Organizations that provide services to vulnerable populations, including survivors of crime and abuse.

Adopt Strong Civil Rights and Anti-Retaliation Protections to Ensure Immigrants' Labor and Civil Rights

DHS should adopt a non-retaliation policy that prohibits DHS from targeting civil and labor rights defenders for arrest, detention, deportation proceedings, or using information derived from civil rights investigations in enforcement operations against such individuals.

- **DHS should prohibit deportations based on arrests that are unconstitutional or violate ICE's own guidelines.**
- **DHS should adopt policies that require local and state law enforcement agencies and detention centers to comply with labor and civil rights laws.**

[11] USCIS Memorandum, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" (June 17, 2011) available at <https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>

[12] *Id.*

[13] Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites, Dec. 7, 2011, www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf.

[14] USCIS Memorandum “Enforcement Actions at or Focused on Sensitive Locations”
(October 24, 2011) *available at* <http://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>